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No. 04-698

In The

Supreme Court of the United States

BRIAN SCHAFFER, a minor,
by his parents and next friends,
JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of
Montgomery County Public Schools, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Five years ago, when the United States was supporting the parents, it aptly described the IDEA as "an important civil rights statute for children with disabilities." U.S. 2000 Amicus Brief at 1. The history of discrimination that gave rise to this landmark legislation was recognized, and the need to hold government accountable was understood. On the burden of proof, the United States convincingly explained that "[a]pplying a presumption of correctness to a draft IEP rejected by the parents . . . would unjustifiably reduce the statute's goal of making the parents meaningful participants in developing the IEP . . . " *Id.* at 11. The United States was right.

Now that the United States is supporting the school district, it says very little about these things.[1] MCPS says even less. Unfortunately, both have lost sight of the IDEA's singular statutory scheme – a unique, equal partnership between parents and the school system. Where there is no consensus, this equal standing logically calls for the burden of proof to be allocated in a way best calculated to advance the fundamental purposes of the IDEA. Thus, concerns about civil rights and parental rights, discrimination and accountability – all of which were well-recognized by the United States five years ago – remain central to this case and provide the key for resolving it.

I. MCPS Misreads the Facts.

MCPS bases much of its case on its unfounded criticism of parents, contending that placing the burden of proof on school districts will prompt parents to be uncooperative in

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[1] Because of its change in sides – and its feeble explanation for switching – the brief of the United States is entitled to no weight or deference. *See Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) (noting that arguments made by the United States are "particularly dubious" when they contradict a position taken by the United States "just five years ago"). At least in *Bates*, the contradictory interpretations were advanced in different cases. Here, they occur within the same case.

the IEP process. Misreading the record, MCPS suggests that petitioners exemplify such lack of cooperation. According to MCPS, the ALJ found that the Schaffers were "predetermined" to send Brian to a private school, and that their participation in the IEP process was only a "mock effort." Resp. Br. at 33, 35. However, MCPS fails to note that this finding by the ALJ was expressly *reversed* by the district court, which found the Schaffers "cooperated fully" and "in no way prevented the IEP from being formulated or otherwise failed in good faith to consider it." Pet. App. 46-47. Beyond the facts of this case, the unwarranted suspicion of parental involvement – as exhibited by MCPS and its school system *amici* – underscores the need to hold school districts accountable. Placing upon them the burden of proof will promote such accountability.

MCPS also tries to explain away its belated decisions to recognize Brian's central auditory processing disorder and offer him placement in a special education learning center. It notes that this placement was in a high school, whereas the dispute over Brian's IEP arose when he was in middle school. Resp. Br. at 10 n.5. Yet, students needing such a placement do not develop those needs only upon reaching high school. The other students at the high school learning center came from somewhere, presumably from a middle school learning center, which respondents never made available to Brian and never discussed with his parents. Thus, MCPS's willingness finally to offer Brian the sort of program his parents had sought from the beginning cannot be credibly explained by his graduation from middle school. A better explanation is the district court's 2000 decision giving MCPS the burden of proof, coupled, perhaps, with a realization by MCPS that it was wrong all along. These facts illustrate the intransigence that school districts may exhibit when they do not bear the burden of proof, and their spirit of cooperation when they do.

II. MCPS Fails to Recognize the Principles That Govern Allocation of the Burden of Proof.

As MCPS concedes, "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*,

487 U.S. 879, 896 (1988); *see* Resp. Br. at 14. Yet, MCPS fails to recognize the state of the law on the burden of proof at key points in the history of the IDEA. In 1975, when Congress enacted the IDEA's predecessor, this Court already had declared that allocation of the burden of proof is not a matter of "hard-and-fast standards" but is "merely a question of policy and fairness." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)).[2] In 2004, a few months before Congress re-enacted the IDEA, this Court re-affirmed that there is "no single principle or rule" for allocating the burden of proof. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) (quoting 9 J. Wigmore, *Evidence* § 2486, at 288 (J. Chadbourn rev. ed. 1981)).

In 2004, the "state of existing law" was to favor placing the burden on school districts. Seven circuits already had reached such a conclusion, *see* Pet. Br. at 18 nn.20 & 21, and the United States had not yet renounced its position agreeing with that result. Most States and most of our Nation's schoolchildren are found within those seven circuits. Only four circuits placed the burden on the parents. Aware of these developments, Congress chose not to settle the circuit split by legislation. Instead, Congress was content to leave the issue to the judicial branch and, *inter alia*, those considerations of "policy and fairness" that this Court said govern the allocation of the burden.

MCPS asks the Court to place the burden on the party who initiates the litigation because Congress did not say otherwise. But this is simply a restatement of the "hard and fast" approach the Court has already rejected. The argument also suffers from an array of other flaws:

1. MCPS says that placing the burden on the party who files the complaint is the "traditional rule." Such simplistic nomenclature yields more smoke than light. As this Court has noted, " 'in a case of first impression,' which

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[2] Drawn from a well-recognized treatise, it is this general principle – rather than an exact factual parallel – that makes *Keyes* especially pertinent here. Thus, MCPS's attempt to side-step *Keyes* is unavailing.

we address today, 'reference to which party has pleaded a fact is no help at all.'" *Alaska*, 540 U.S. at 494 n.17 (quoting 2 J. Strong, *McCormick on Evidence* § 337, at 412 (5th ed. 1999)). Moreover, "this so-called 'rule' is, in actuality, merely a presumption and not a very strong one at that." Pet. App. 17 (Luttig, J., dissenting).[3] In any event, the equal standing that the IDEA gives to parents, *see* Pet. Br. at 7, is a very *non*-traditional arrangement, and it makes use of any "traditional rule" inapposite.

2. MCPS also describes the approach it advocates as a "default rule." *See* Resp. Br. at 16, 20. However, a "default rule" is one that does not come into play unless and until all other sources of guidance have been exhausted. In due process hearings, there is no need for a "default rule" because other sources of guidance – including "policy and fairness" – fix the burden on the school district.

3. It is sometimes said that, when the evidence is in equipoise, the judgment should go against the party seeking to change the *status quo*. *See* 2 J. Strong, *McCormick on Evidence* § 337 at 412 (5th ed. 1999). Under the IDEA, however, when there is no previously-established IEP, neither side can claim that its proposal represents the *status quo*.[4] Since the *reason* for the rule does not apply,

[3] Although MCPS cites various authorities for the proposition that the burden is placed on the party initiating the litigation, most of those authorities qualify their conclusion with words like "ordinarily" and "normally." *See* Resp. Br. at 15. To cite such authorities begs the question whether the case at bar is one of those exceptions to which these words of qualification point.

[4] Seeking to treat the school district's proposal as the *status quo*, the United States mistakenly contends that "[u]nless a parent objects to a proposed IEP, the IDEA allows the IEP to go into effect." U.S. 2005 Amicus Br. at 23 (citing 20 U.S.C. § 1415(b)(6) & (7)). The cited statutes say nothing of the sort. Instead, they are part of the "procedural safeguards" for "children with disabilities and their parents." *See* 20 U.S.C. § 1415(a). When a child is applying for initial admission to public school – as was the case here – there is no previously-established IEP, and implementation of the school district's proposal requires the parents' affirmative consent. 20 U.S.C. § 1415(j). This is exactly the *opposite* of what the United States suggests.

the rule does not apply.[5] *United States v. Chambers*, 291 U.S. 217, 226 (1934).

III. Under the IDEA, Parents and School Districts Have Equal Standing. Where There Is No Agreement, There Is No IEP and No Official Action to Which a Presumption Can Attach.

A strong parental rights measure, the IDEA makes parents and the school district "equal partners" in the development of a child's IEP. 34 C.F.R. Part 300, App. A, Question 9. *See* 20 U.S.C. § 1414(d)(1)(B)(i) (making parents members of IEP team); 20 U.S.C. § 1415(j) (preventing school from implementing initial IEP or changing previously agreed placement without parental consent). Ignored by MCPS – and by the United States – this equal standing in the development of official action is unique in the law. It sets the IDEA apart from other civil rights measures,[6] and it undermines the argument that a presumption of regularity attaches to the school district's IEP proposal.[7]

[5] Where there is a previously-established IEP, the district court said the burden of proof should be allocated to *whichever* party – parents or school district – seeks to change that IEP. Pet. App. at 34. At least one court has ruled that the burden should be placed on the school district in *all* cases. *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1188 (N.J. 1989). Rejecting these options, the Fourth Circuit ruled that parents bear the burden even when they challenge a school district's unilateral 90 percent cut in services. *JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 196 (4th Cir. 2005) (citing case at bar).

[6] Thus, the precedents cited by MCPS from other contexts are inapplicable. Additionally, MCPS's reliance on § 504 of the Rehabilitation Act of 1973 ignores the fact that allocation of the burden in such cases is the subject of a circuit split. *See, e.g., Juvelis v. Snider*, 68 F.3d 648, 653 & n.5 (3d Cir. 1995) (holding that the burden of proving a proposed accommodation is unreasonable rests with the defendant).

[7] Such uniqueness also means that placing the burden of proof on school districts would not have the wide-ranging precedential effect that some of MCPS's *amici* suggest. Although most circuits already place the burden on school districts, MCPS and its *amici* have not cited any case that used an IDEA decision as the basis for placing the burden on government in some other context.

1. This Court has said that "[t]he presumption of regularity supports the *official acts* of public officers." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14 (1926) (emphasis added).[8] Thus, one prerequisite to any such presumption is that the official has taken action of the sort that he is legally authorized to take. Under the IDEA, government may *not* implement a new IEP unilaterally. It must obtain the consent of the parents. Where there is no agreement, there is no IEP. *See* Pet. App. 38 (district court). Accordingly, there is no "official act" to which any presumption of regularity can attach. Indeed, the "regular" course of IDEA proceedings is for parents and school officials to reach a consensus. Where the process leads to an impasse instead, such a manifestly *irregular* result is a very poor basis from which to infer a presumption of regularity.

2. The "presumption of regularity" for officials refers to two different concepts. One is a presumption of "good faith," and the other involves occasions when "an act of a public official require[s] certain predicate acts (or facts) to be lawful." *Tecom, Inc. v. United States*, 2005 U.S. Claims LEXIS 195, at *77 (Fed. Cl. June 27, 2005).[9] Under the second concept, when the official acts, the predicate act or fact is presumed to have occurred. Neither concept applies here. "Good faith" is not an element of whether an IEP is appropriate. Moreover, the predicate fact for an IEP to be lawful or regular is for there to be an agreement between the school district and parents. Where there is an impasse, the predicate fact is missing. Thus, no presumption can arise.

[8] In any event, the presumption is not a hard and fast rule. It is only "a general working principle." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

[9] Another kind of presumption of regularity is used in connection with review of actions under the Administrative Procedure Act ("APA") *Tecom*, at *83. IDEA disputes are not governed by the APA. Additionally, where Congress wishes to establish a presumption of *correctness*, it knows how to do so. *See* 28 U.S.C. § 2639(a)(1) ("the decision of the Secretary of the Treasury ... is presumed to be correct"). No such language about a proposed IEP appears in the IDEA.

3. "[T]he law ... presumes that *every* man, in his *private* and official character, does his duty, until the contrary is proved...." *Bank of United States v. Dandridge*, 25 U.S. 64, 69 (1827) (emphasis added). Thus, parents have a presumption in their favor, too. Because parents and school districts have equal standing in developing an IEP, the two presumptions cancel each other out.

4. Giving the school district a presumption of regularity would also lead to perverse results. In some cases, disputes arise over the extent to which the child's disability may limit the benefit he can derive from services, and thus limit the school's obligation to provide services. *E.g., Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) ("[O]ne might demand only minimal results in the case of the most severely handicapped children."). In such cases, a presumption in favor of the school district's view would translate into a presumption against the child's potential. Such an approach runs contrary to the basic premises of the IDEA and reinforces the stereotypes and discriminatory attitudes the IDEA was designed to combat. If the evidence is in equipoise, the decision should favor providing services to the child.

5. Some MCPS *amici* make the same mistake exposed by the United States five years ago. They "confuse[] *deference*, which concerns the weight to be given to evidence, with the *burden of proof*, the obligation to persuade the trier of fact with the truth of a proposition." U.S. 2000 *Amicus* Brief at 9 (emphasis added).[10] Assuming *arguendo* that the testimony of school employees should be given deference, it does not follow that the school district, as a party, should be spared the burden of proof. Indeed, the contrary would seem true. If, despite the added weight given to its witnesses, the best the school district can do is

[10] The difference is further illustrated by cases where, instead of marching in lockstep, some school employees support the parents on key issues. *E.g., JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190-94 (4th Cir. 2005). Both sides may have school employees as witness, but both sides cannot have the burden of proof.

to bring the evidence into equipoise, that is another reason to rule in favor of the parents.[11]

IV. Federalism Concerns Do Not Shield the Local School District from the Burden of Proof.

Federalism is an important part of our constitutional system; however, federalism concerns do not govern the outcome here. In a belated attempt to invoke these concerns, MCPS contends that, because the IDEA is a Spending Clause program, any condition imposed on school districts must be stated "unambiguously" in the statute. Resp. Br. at 29 (citing *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))). The argument is misplaced.

1. The argument should not be considered because it was "neither pressed nor passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990). At every level below, the burden of proof was argued and decided as an issue of *federal* law, with no suggestion that state interests might be implicated.[12]

2. Even now, the State of Maryland has not asserted any state interest in how the burden of proof is allocated. The State has not enacted any statute or regulation on this issue,[13] nor has it filed an *amicus* brief in support of MCPS, choosing instead to maintain neutrality between its citizens and its schools districts.[14] As Maryland's

[11] MCPS and the United States concede that the burden should be on the school where the school seeks the administrative hearing. Their view that school officials are entitled to a presumption of correctness is at odds with this concession.

[13] Even in the few circuits where the burden is placed on parents, MCPS has cited no decision that bases its result on a federalism or Spending Clause argument.

[13] Thus, the United States is off the mark when it describes the issue as whether "the IDEA . . . conditions federal funds on the requirement that States *modify their rules* and shift the burden of proof in all instances onto their schools." U.S. 2005 *Amicus* Br. at 17 (emphasis added).

[14] *See* Letter of S. Sullivan, Maryland Solicitor General, to E. Williams, dated May 25, 2005 ("It is important for the State Department of

(Continued on following page)

neutrality illustrates, States and their local school districts have sharply different roles in IDEA due process hearings. School districts are litigants, while the role of the State is to act as an "umpire" between those school districts and parents. *See* 20 U.S.C. § 1415(g) (discussing "impartial" and "independent" role of state education agency).[15] Thus, it makes little sense to allow a school district to step into the shoes of the State and assert a federalism interest that the State has declined to assert for itself. *See Pennhurst*, 451 U.S. at 24 (explaining the grant condition must be stated clearly so that "*the States* can knowingly decide whether or not to accept those funds.") (emphasis added). Assuming *arguendo* that States have the right to allocate the burden of proof – one way or the other – in IDEA due process hearings, it says nothing about how the burden should be allocated where the State has *not made* such an allocation. In short, federalism concerns are not implicated in this case. The burden of proof must be guided by other considerations.

3. In any event, the federalism argument is simply unpersuasive. MCPS oversimplifies and overextends the rules of construction applicable to Spending Clause programs under *Pennhurst*. Where Congress has enacted a Spending Clause program to protect individuals against discrimination, this Court has not allowed *Pennhurst* to stand in the way of finding a private right of action, even where the statute is silent. *See Barnes*, 536 U.S. at 185-86 (discussing "judicially-implied" origin of private right of action under two Spending Clause statutes, Title VI and

Education to maintain its neutrality toward all families and local school systems its serves. For this reason, the Office of Attorney General of Maryland has decided not file a brief as *amicus curiae* in support of either party in *Schaffer v. Weast*.").

[15] This difference in roles is also illustrated by the *amicus* briefs, which show a sharp division between several statewide school board associations and their respective States. *Compare* Brief of Virginia, *et al.* (merits stage), *with* Brief of Virginia Ass'n of School Boards, *et al.*

Title IX).[16] Under the IDEA, the Court need not go so far. The parents' right to bring an administrative action against the school district is in the text of the statute. Assigning the burden of proof to the school district merely supplies a clarifying detail.

4. While sometimes using a "contract-law analogy," this Court "[has] been careful not to imply that *all* contract-law rules apply to Spending Clause legislation." *Barnes*, 536 U.S. at 186 (emphasis in original). Instead, the principal use of the analogy has been to limit the circumstances under which "funding recipients may be held liable for *money damages*." *Id.* (emphasis added). Such a remedy is available "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis in original). In the case at bar, "damages" are not at issue; and the financial obligation to provide a free appropriate public education is clearly set out in the IDEA. Thus, the *Pennhurst* "contract-analogy" does not shield school districts from the burden of proof.

5. States are also on notice that their school districts must participate in hearings. 20 U.S.C. § 1415(f). Because all hearings must have a burden of proof and other rules to govern them, States are also on notice that issues about such details will inevitably arise. It would be an unwarranted extension of *Pennhurst* to say that all such issues must be resolved in favor of the school district unless the IDEA unambiguously states otherwise.[17] *See Bennett v. Kentucky*

[16] This Court has already recognized the IDEA as a remedy for violations of the Equal Protection Clause, thus indicating that the law is also based on § 5 of the Fourteenth Amendment. *Smith v. Robinson*, 468 U.S. 992, 1013 (1992). *See* Brief for the Arc of the United States, *et al.* at 18-22 (discussing origin of IDEA as remedy for constitutional violations).

[17] Because the burden of proof is an inherent part of every hearing and *must* be placed on one side or the other, the failure of Congress expressly to allocate the burden does not preclude this Court from doing so. Thus, this case is fundamentally different from *Honig v. Doe*, 484 U.S. 305, 324 (1988), where Congress failed to include a "dangerousness exception" in the IDEA, and the Court declined to do so.

Dept. of Educ., 470 U.S. 656, 669 (1985) (rejecting suggestion that all ambiguities in grant conditions must be resolved in State's favor).[18] Yet, that is the logical result of MCPS's argument.

6. Finally, nineteen States have communicated to this Court their view that there should be a uniform national rule, a position necessarily contrary to the federalism argument advanced by MCPS.[19] Only three States plus one territory – Hawaii, Alaska, Oklahoma and Guam – have supported the MCPS position. *See* Brief of Hawaii, *et al.*[20] Such a weak showing of support for an argument that purportedly vindicates States' rights is especially telling given the fact that most States – a total of 29 – lie in circuits where the burden is now placed on the local school district. The federalism concerns are unfounded.

V. Neither the Text of the IDEA Nor the 2004 Amendments Support MCPS.

MCPS strains to discern in the text of the IDEA and the 2004 amendments some indicia of congressional intent favorable to its position. None can be found.

1. MCPS claims that, because Congress expressly adopted a number of procedural safeguards, it must not have wanted parents to have the additional benefit of a burden of proof placed on the school district. But almost all of these safeguards are reciprocal, benefiting school districts as well as parents. Most provide rights that due

[18] Moreover, because the IDEA uses the term "impartial *due process* hearing," States are on notice that issues about the conduct of the hearings must be resolved, where possible, by principles of due process. *See* Pet. Br. at 22-28; *infra* at 14 n.23.

[19] *See* Brief of Virginia, *et al.* (petition stage); and Brief of Virginia, *et al.* (merits stage).

[20] The author of that brief – the State of Hawaii – is the exception that proves the rule. In Hawaii, there are no local school districts. Hawaii Dep't of Education, "About Us" *available at* http://doe.k12.hi.us. Schools are run directly by the State, thus making Hawaii both umpire and litigant.

process principles would not address. The fact that Congress specified a number of details governing the IEP process does not indicate an intention to allocate the burden of proof one way or the other. Indeed, when Congress wants to fix the burden of proof legislatively, it knows how to do so. *E.g.*, 5 U.S.C. § 556(d) (placing burden of proof on "proponent of a rule or order" under the Administrative Procedure Act ("APA")); 28 U.S.C. § 2639(a)(1) (placing burden of proof on party challenging decision by Secretary of the Treasury). No such statute governs here.

2. MCPS misunderstands the meaning of an IDEA disciplinary provision as it existed between 1997 and the 2004 amendment. *See* Resp. Br. at 26-27. Under this provision, in cases involving student misconduct, a hearing officer could order a temporary change of placement for a disabled child, "if the hearing officer determines that the public agency has demonstrated by *substantial evidence* that maintaining the current placement of such child is *substantially likely* to result in injury to the child or to others." 20 U.S.C. § 1415(k)(2)(A) (emphasis added).[21] The purpose of this provision was to create a different *level* of proof than the "preponderance" level governing other IDEA administrative hearings. It does not imply that Congress wished for parents to bear the burden of proof in disputes involving IEP development.

3. In 2004, Congress adopted several amendments to encourage parents and school districts to resolve their disputes *before* they reach the hearing stage, as well as additional notice requirements and a nationwide statute of limitations. Pointing to these amendments, MCPS contends that congressional policy would be furthered by placing the burden on parents, thereby reducing the number of hearings that parents seek. Resp. Br. at 34. Such an argument mistakenly assumes that, by encouraging the resolution of disputes at pre-hearing stages,

[21] A related provision, § 1415(k)(6)(B)(i), made it clear that, when dealing with a final decision on the merits, the altered level of proof was no longer applicable.

Congress was more concerned with parental uncooperativeness than with school district intransigence. MCPS offers no basis for such an assumption, and placing the burden on parents is likely to exacerbate the need for hearings by encouraging such intransigence by school districts. MCPS also assumes that reducing hearings – rather than ensuring an appropriate education – is now the polestar of congressional policy, and that Congress wished to reduce the number of hearings even at the expense of discouraging parents from asserting *meritorious* claims.[22] It offers no basis for such an assumption.

4. Finally, MCPS tries to draw support from the term "due process" as it appears in the IDEA. Skipping past the three-part due process test found in *Mathews v. Eldridge*, 424 U.S. 319 (1976), MCPS cites *Lavine v. Milne*, 424 U.S. 577 (1976). Yet, *Lavine* stands for the proposition that it does not offend the Constitution to require applicants for welfare benefits to demonstrate their eligibility. *Id.* at 584-87. Public education is not welfare. Moreover, where parents and a school district are negotiating an IEP, the child's *eligibility* for IDEA services has already been settled. *Lavine* also notes that the burden of proof is "normally" not a constitutional issue, but that a different result may be warranted where "special concerns attend." *Id.* at 585. Removing historic discrimination against children with disabilities – and educating them to become productive citizens – are concerns that are important enough to implicate the burden of proof.[23]

[22] Congress did intend to discourage claims that are "frivolous, unreasonable or without foundation" by making parents' attorneys liable for legal fees incurred by school districts in such cases. 20 U.S.C. § 1415(i)(3)(B)(i)(II). Claims where the burden of proof is dispositive are manifestly not the ones Congress sought to discourage.

[23] MCPS also misperceives – and fails to refute – petitioners' textual argument. *See* Pet. Br. at 22-28. The point is not that the Constitution operates directly on IDEA hearings in such a way as to allocate the burden to the school district. The point is that, by deliberating using the words "due process," Congress imported that familiar standard into a statutory context. Thus, due process standards apply

(Continued on following page)

VI. "Policy and Fairness" Require the Burden to be Placed on the School District.

"[W]here the statute's language seem[s] insufficiently precise, the natural way to draw the line is in light of the statutory purpose." *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (internal quotation marks and citation omitted). The purposes of the IDEA are best served by placing the burden on the school district. MCPS's arguments to the contrary are without merit.

1. MCPS claims that, if the burden of proof is placed on school districts, the number of hearings will expand to unacceptable levels because of uncooperative parents. Resp. Br. at 35. Yet, in most States, school districts already have the burden of proof, and their experience does not support MCPS's dire prediction. In Oklahoma – one of the three States supporting MCPS – the 10th Circuit places the burden on parents. Next door, in Arkansas, the 8th Circuit places the burden on the school district. Yet, in Oklahoma, there were 1.3 actual hearings per 10,000 special education students, compared to 1.2 for Arkansas.[24] Overall, the States in the 10th Circuit saw a total of 6.5 hearings per 10,000 special education students, while the States in the neighboring 8th Circuit saw only 4.4.[25] It should also be noted that the State with the highest incidence of hearings is New York (23.0 per 10,000), while the States with the lowest incidence are Montana, Nebraska and North Dakota (zero). In all four States, the burden is on the school district,[26] a fact strongly suggesting

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whether or not the IDEA involves a cognizable liberty or property interest. Prominent among due process standards is the three-step test outlined in *Mathews*, which leads to the conclusion that the burden must be placed on the school district. *See* Pet. Br. at 24-26 (applying *Mathews* test).

[24] *See* Consortium for Appropriate Dispute Resolution in Special Education, *Dispute Resolution National Summary Statistics for School Year 2002-2003: Hearings* (Apr. 20, 2005).

[25] *Id.*

[26] *Id.*

that parental demand for hearings is much more dependent on other factors.

2. MCPS contends that, if the burden is placed on school districts, they will not be able to prepare adequately for due process hearings. Resp. Br. at 33. The claim is not rooted in reality. Long before reaching a hearing, the school district has an obligation to develop an IEP proposal based on the needs of the individual child. If the school district has done its job, it already will have marshaled the facts and expert opinions necessary to explain why its proposal is appropriate. Presenting its position at a hearing should not be difficult. Indeed, the task is made lighter by the fact that the school district only needs to address the subject matter contained in the parents' due process notice. 20 U.S.C. § 1415(f)(3)(B). If the school district believes the notice is insufficient, it has the right to ask the hearing officer to dismiss the case. 20 U.S.C. § 1415(c)(2)(A), (C) & (D) (2005). Moreover, MCPS confuses the burden of proof – *i.e.*, the burden of persuasion – with the burden of production. The case at bar involves only the former. Assigning the burden of proof to the school district would not prevent a hearing officer, in an appropriate case, from calling upon parents to present their evidence first, requiring them to make out a *prima facie* case that the school district would then have the burden of overcoming. Finally, MCPS disregards the right of rebuttal that ordinarily should be afforded to the party having the burden of proof. School districts will not lack skilled and experienced attorneys to press these points. *See* Pet. Br. at 47. In any event, whatever litigation challenges the school district might face if it had the burden of proof, similar difficulties – if not greater ones – would be imposed on the parents if they were to have the burden.

3. A common theme runs through the briefs filed by MCPS and its school system *amici*. The theme is money. They say that special education is too expensive, and that Congress does not appropriate enough money. Certainly, more money for special education – and for education in general – would be desirable. However, this is not a reason to place the burden of proof on parents.

a. It is important to keep costs in perspective. One of the MCPS *amici* complains that school districts spend an estimated $146.5 million per year on "special education mediation, due process and litigation activities." Br. of National Sch. Bd. Ass'n at 6 n.5. Yet, given the 6.7 million children who receive services under the IDEA (13 percent of the student population), this translates into about $22 per child, not an onerous amount to assure compliance with an important civil rights law.[27]

b. Making it more difficult for children with disabilities to obtain the services they need only *masks* the funding problem; it does not solve it. Moreover, it is hardly fair – or constitutional – for school districts to balance their budgets by targeting the disabled. "The inadequacies of the [school district] whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972). Over a decade ago, this Court explained that "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can . . . give the child a free appropriate public education in a public setting." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). Choosing to litigate rather than educate, MCPS did not heed this admonition.

c. The school systems' focus on money underscores parental concerns that special education officials will cut corners and offer children something less than what the law requires in order to keep within the often arbitrary budgetary limits their school districts have allotted them. "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society

[27] By contrast, MCPS per pupil expenditures for 2005 are projected to be $10,537. *See* http://www.mcps.k12.md.us/about/. The $22 "compliance cost" is about 1/5 of one percent of this sum.

as a whole." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (6th Cir. 2004). There is an inevitable institutional incentive for school districts to reduce costs by minimizing a child's individual needs. Calling upon the school district to show that its plan is appropriate provides a well-advised counterweight to that incentive.

4. MCPS suggests that parents know more about their children than the schools do. *See* Resp. Br. at 40. Unfortunately, such a deferential attitude toward parents is markedly different from the dismissive attitude that often prevails at IEP meetings.[28] Moreover, no matter how well they know their children, parents are typically not schooled in the professional disciplines having expertise pertinent to the diagnosis of disabilities and the design of an appropriate IEP.[29]

In any event, knowing the child is only part of the equation. In order to design an appropriate IEP, it is necessary to know what educational resources are available as well as what successes – or failures – a school district may have encountered in its special education programs. The school district has almost exclusive access to this information. *See* Pet. Br. at 42. MCPS ignores this concern. MCPS also ignores the school's control over the creation of school records and its ability to decide unilaterally what observations are included in or excluded from those records. Nor does MCPS address the fact that parents have no right even to observe the program proposed by the school district. *See* Pet. Br. at 41. These are

[28] *See* Brief for the Arc of the United States, *et al.* at 14-15 (citing sources); Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 26-27 (citing sources); Brief of Various Autism Organizations at 12 (citing sources).

[29] The difficulty encountered by parents in obtaining expert testimony has been compounded by the recent decision of the D.C. Circuit that the IDEA does not allow prevailing parents to recover expert witness fees. *Goldring v. District of Columbia*, No. 04-7116, 2005 U.S. App. LEXIS 15235 (D.C. Cir. July 26, 2005). As a result of *Goldring*, a majority of circuits that have decided the issue have ruled against recoverability of such fees. *Id.* at * 7-8.

precisely the kinds of concerns that troubled Judge Luttig in his dissent: "[M]ost . . . parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children." Pet. App. 20.

5. The parties agree that allocation of the burden of proof will have a "ripple" effect, affecting negotiation dynamics between parents and school officials well before the hearing stage. They disagree, however, on what that effect will be. Disparaging the citizens it was created to serve – and giving no evidence for its allegations – MCPS contends that placing the burden on school districts will encourage parents to be uncooperative and "snub" the IEP process. Resp. Br. at 36. Petitioners maintain that placing the burden on parents will strengthen the hand of often-intransigent school district bureaucracies, and that allocating the burden to school officials will provide "an additional incentive" for those officials to draft IEPs that will provide the child with an appropriate education. Pet. Br. at 33-34 (quoting U.S. 2000 Amicus Brief at 12). The latter point is amply illustrated by the facts of the case at bar. *See supra* at 1; Pet. Br. at 13.

Resolution of these competing claims should be guided by the purposes of the IDEA, which arose out of a deep concern – justified by experience – that many children with disabilities suffer discrimination at the hands of local school districts. MCPS does not deny that the prejudice leading to the enactment of the IDEA still persists. *See* Pet. Br. at 31. Indeed, the obligations of the IDEA have not been universally welcomed. Perhaps the most striking example is found in *Felix v. Cayetano*, No. 93-00367 (D. Haw. filed May 4, 1993), which involved the public schools of Hawaii, author of an *amicus* brief supporting MCPS. In *Felix*, the Hawaii public schools spent over a decade under supervision by a federal court because the State "systemically failed to provide required and necessary educational and mental health services to qualified handicapped children . . . in violation of the [IDEA]." *Felix*, summary judgment order (May 24, 1994). While Hawaii was released from court

supervision on May 31, 2005, it would be naïve to suppose that the attitudes that contributed to the need for such a remedy have been entirely eliminated. It would likewise be naïve – and unfair to Hawaii – to believe that such attitudes are only a problem in that one State.[30]

As this Court observed in another civil rights context, "the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). So, too, it is with discrimination against the disabled.[31] The persistence and subtlety of such discrimination means that parents have more to fear from government, than government has to fear from parents. On the whole, it is again government – not parents – that is more in need of an incentive to cooperate.

6. Finally, the consequences of an erroneous decision must be taken into account. The child will suffer far more harm if contested services are erroneously denied, than the school district will suffer if those services are erroneously ordered. *See* Pet. Br. at 34-39. Although petitioners were able to provide Brian the services he needed until MCPS finally relented, not all children will be so fortunate; and delay can be disastrous. "[A] few months can make a world of difference in the life of [a] child." *Foster v. District of Columbia Bd. of Educ.*, No. CA-82-0095, EHLR

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[30] Widespread violations of the IDEA also have led to court supervision of public schools in Los Angeles and Chicago; and, in Maryland, state officials have charged Baltimore public schools with "a failure of extraordinary magnitude" in the education of disabled students. *Chanda Smith v. Los Angeles Unified Sch. Dist.*, CV 93-7044-RSWL (C.D. Cal. filed 1993) (history and current decree *available at* www.oimla.com); *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998); Nick Anderson, *Maryland Seeks Role in Special-Ed For Baltimore*, Washington Post, July 26, 2005, at B-04.

[31] *See, e.g., Americans with Disabilities Act*, 42 U.S.C. § 12101(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . ").

553:520 (D.D.C. Feb. 22, 1982).[32] MCPS makes no attempt to refute this assessment, nor does it dispute the special solicitude that our law shows for the welfare of children and the rights of parents, *see* Pet. Br. at 38, nor does it deny that, under this Court's jurisprudence, the consequences of error must be considered when the burden of proof is at issue. *See* Pet. Br. at 34. These tacit concessions by MCPS provide a compelling reason to place the burden on the school district. Indeed, to do otherwise would deny children with disabilities the full measure of protection that this landmark civil rights measure was designed to ensure.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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by his Parents and
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[32] *See, e.g.*, Henri E. Cauvin, *Some Parents Push for Alternative to D.C.'s Special-Ed*, Washington Post, June 12, 2005, at C-13 (reporting case of severely disabled child who may never learn to chew or swallow because school officials insisted that therapy to address those skills was not needed; court later ordered private placement).